



STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)

DECISION

MRA-25/50508

PRELIMINARY RECITALS

Pursuant to a petition filed September 13, 2001, under Wis. Stat. §49.45(5) and Wis. Adm. Code §HA 3.03(1), to review a decision by the Iowa County Dept. of Social Services in regard to spousal impoverishment MA, a telephone hearing was held on November 9, 2001. A hearing previously set for October 29, 2001 was rescheduled at petitioner's request. Following the hearing the record was held open for 40 days for the submission of information on behalf of petitioner.

The issue for determination is whether the community spouse is eligible for an increase in the Community Spouse Maximum Income Allocation in order to continue meeting her basic maintenance needs in the community.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

(petitioner)

Representative:

Respondent:

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309

By: Marlene Stenner, ESS
Iowa County Dept Of Social Services
109 W. Fountain Street
Dodgeville, WI 53533

ADMINISTRATIVE LAW JUDGE:

Kenneth P Adler
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is a resident of Iowa County. Petitioner entered a skilled nursing facility in February 1999.

2. An asset assessment was completed on March 10, 1999. At that time the combined assets for petitioner and his community spouse totaled \$162,535.45. The Community Spouse Asset Share (CSAS) was determined to be \$81,267.72 and petitioner's asset allowance was \$2,000. Exhibits 1, 2
3. On March 11, 1999 the county agency issued a notice of decision informing petitioner his MA application was denied as the couple's combined assets exceeded the allowable limits. Exhibit 3
4. On September 6, 2001 petitioner's power of attorney requested MA for petitioner's nursing home care. Total combined assets at the time of application, which were all owned jointly by the couple, were \$121,947.46. Those assets generated the following monthly income:

	<u>Amount</u>	<u>Interest Income</u>
Edward Jones Money Market	\$35,562.44	\$148.17
CD# xxxxx	\$ 4,000.00	\$ 18.08
CD# yyyyy	\$45,000.00	\$225.00
Checking account #xxxxxx	\$37,385.32	\$ 32.46
Total	\$121,947.46	\$423.71

5. On September 7, 2001 the county agency issued a notice informing petitioner the MA application was denied as the couple's assets continued to exceed the allowable limits. Exhibit 4
6. Petitioner has the following monthly income: Social Security - \$942; Farm Bureau Financial Services - \$17.50. The community Spouse has monthly income from Social Security of \$423.
7. Combined monthly income from the couple's assets is determined to be \$423.71.
8. On December 5, 2001 petitioner passed away. MA eligibility is sought for the period September 1 – December 5, 2001.

DISCUSSION

The federal Medicaid Catastrophic Coverage Act of 1988 (MCAA) included extensive changes in state Medicaid (MA) eligibility determinations related to spousal impoverishment. In such cases an "institutionalized spouse" resides in a nursing home or in the community pursuant to MA Waiver eligibility, and that person has a "community spouse" who is not institutionalized or eligible for MA Waiver services. Wis. Stat. §49.455(1).

The MCAA established a new "minimum monthly needs allowance" (MMMNA) for the community spouse at a specified percentage of the federal poverty line. This amount is the amount of income considered necessary to maintain the community spouse in the community. After the institutionalized spouse is found eligible, the community spouse may, however, prove through the fair hearing process that he or she has financial need above the MMMNA based upon exceptional circumstances resulting in financial duress. Wis. Stat. §49.455(4)(a).

When initially determining whether an institutionalized spouse is eligible for MA, county agencies are required to review the combined assets of the institutionalized spouse and the community spouse. MA Handbook, Appendix 23.4.0. All available assets owned by the couple are to be considered. Homestead property, one vehicle, and anything set aside for burial are exempt from the determination. The couple's total non-exempt assets then are compared to the "asset allowance" to determine eligibility.

The county determined that the current asset allowance for this couple is \$87,267. See the MA Handbook, App. 23.4.2, which is based upon Wis. Stat. §49.455(6)(b). \$2,000 (the MA asset limit for the institutionalized individual) is then added to the asset allowance to determine the asset limit under spousal impoverishment policy. If the couple's assets are at or below the determined asset limit of \$83,267, the institutionalized spouse is eligible for MA. If the assets exceed the above amount, as a general rule the spouse is not MA eligible.

As an exception to this general rule, assets above the allowance may be retained as determined through the fair hearing process, if income-producing assets exceeding the asset limit are necessary to raise the community spouse's monthly income to the minimum monthly needs allowance. The minimum monthly maintenance needs allowance in this case is \$1,875. MA Handbook, Appendix 23.6.0 (5-1-00).

Wis. Stat. §49.455(6)(b)3 explains this process, and subsection (8)(d) provides in its pertinent part as follows:

If either spouse establishes at a fair hearing that the community spouse resource allowance determined under sub. (6)(b) without a fair hearing does not generate enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c), the department shall establish an amount to be used under sub. (6)(b)3 that results in a community spouse resource allowance that generates enough income to raise the community spouse's income to the minimum monthly maintenance needs allowance under sub. (4)(c).

Based upon the above, a hearing examiner can override the mandated asset allowance by determining assets in excess of the allowance are necessary to generate income up to the minimum monthly maintenance needs allowance for the community spouse. Therefore, the above provision has been interpreted to grant a hearing examiner the authority to determine an applicant eligible for MA even if a spousal impoverishment application was initially denied based upon the fact the combined assets of the couple exceeded the spousal impoverishment asset limit.

Subsection (8)(d) quoted above includes a final sentence that requires the institutionalized spouse to make his or her income available to the community spouse before the assets are allocated. However, the Wisconsin Court of Appeals, in Blumer v. DHFS, 2000 WI App 150, 237 Wis. 2d 810, __ N.W. 2d __, concluded that the final sentence violated the mandate of the federal MCCA law. The Blumer court held that the hearing examiner first must allocate resources to maximize the community spouse's income, and only if the resources' income does not bring the community spouse's income up to the monthly minimum can the institutionalized spouse's income be allocated. The Blumer decision was appealed to the United States Supreme Court, with oral argument before that body this fall. However, as no decision has yet been issued, the Wisconsin Court of Appeals decision is currently it is the law that must be followed.

Based upon the *Blumer* decision, petitioner's *assets* which are generating a reasonable rate of return must *first* be allocated to the community spouse to attempt to raise her monthly income to the MMMNA. The result in this case is as follows. Petitioner's wife has sole monthly income of \$634.85 including her Social Security of \$432 per month and her half of the monthly income ($\$423.17/2 = \211.85) from the jointly held assets which are all generating a reasonable rate of return. See Finding of Fact #4. Using only this income, petitioner's wife is \$1,300.15 below the MMMNA of \$1,935 ($\$1,935 - \$634.85 = \$1,300.15$). Therefore, I conclude it is necessary she be allowed to retain all the couple's assets in order to generate income to reach the MMMNA of \$1,935.

The monthly income generated by petitioner's share of the assets is \$211.85. This income, combined with petitioner's wife's own income of \$634.85 equals \$846.70. As she still remains below the MMMNA of \$1,935, petitioner's wife is also eligible to receive all her husband's *income* of \$959.50 (Social Security - \$942, Farm Bureau - \$17.50) which increases her monthly income to \$1,806.20. This

continues to place her below the MMMNA of \$1,935 by \$62.80. However, there is no more money available to the couple and no additional income to allocate to the community spouse. Therefore, petitioner is not liable for any nursing home payment.

CONCLUSIONS OF LAW

1. That all assets of petitioner and his wife must be allocated to his wife to raise her monthly income to the MMMNA.
2. That the asset allowance be increased to \$121,947.46.
3. That all income of petitioner must be allocated to his wife.
4. That petitioner has no nursing home liability.

NOW, THEREFORE, it is

ORDERED

That the matter be remanded with the following instructions: (1) increase the community spouse asset share to \$121,947.46; and (2) allocate all petitioner's income to the community spouse; and (3) certify petitioner eligible for MA effective September 1, 2001 forward. The agency shall take these actions within ten (10) days of the date of this decision.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, , as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of
Madison, Wisconsin, this 11th day of
January, 2002

/sKenneth P Adler
Administrative Law Judge
Division of Hearings and Appeals
27/KPA